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No. 2746.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

John Grant Lyman,
Plaintiff in Error,

vs.

United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ALBERT SCHOONOVER,
United States Attorney.

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BRIEF OF DEFENDANT IN ERROR.

Plaintiff in error makes two points in support of his appeal herein:

Point One.

"The introduction in evidence over the objection of the defendant of his private papers and documents obtained without warrant or authority of law is in violation of the spirit and letter of the fourth and fifth amendments to the federal Constitution." (Brief, page 40.)

POINT TWO.

"The court erred in giving the instruction to the jury set out in assignment of error 148 [Tr. fol. 1301], as follows: 'Replying to the question which you have propounded to me, I instruct you that the mailing of a letter without the fraudulent intent would be no crime. If, however, the evidence satisfies you beyond a reasonable doubt that the fraudulent intent was in the mind of the defendant before the mailing of any one of the letters mentioned in the indictment, then, as to the count in which that letter is set forth, the fraudulent intent is sufficiently established.'" (Brief, pages 45, 46.) Which instruction was given in reply to a question by a juror, as follows:

"Juror Brownstein: We would like to be enlightened in regard to the alleged intent of the defendant to defraud. Are we to consider his intent at the time of organizing the Panama Development Company, or at the time the several letters in the indictment were written and mailed, or any subsequent time?"

ARGUMENT.

POINT ONE.

It appears from the portions of the transcript referred to on page 40 of the brief that the documents introduced in evidence were not the private papers of the defendant, but were part of the files and records of the Panama Development Company, a corporation; and it is not contended that the defendant may invoke the protection of the fourth and fifth amendments to

prevent the introduction of corporate documents tending to criminate him.

But, if such objection to the introduction of these documents had been available to defendant at a proper time, his objection, made for the first time when they were offered in evidence, came too late. Defendant had every opportunity, for more than two years, to make a "seasonable application for their return." Weeks v. United States, 232 U. S. 398.

Of the Weeks case, counsel in their brief say: "The Boyd case is affirmed and quoted with approval in the recent case of United States v. Weeks, 132 (232) U. S. 383." (Brief, page 45.)

True, the court in the Weeks case did not quote with approval from the opinion in the Boyd case, 116 U. S. 616, as to the purpose and scope of the fourth and fifth amendments, and held that the accused's rights thereunder had been violated because, first: papers seized in that case were the private papers of the accused, and second: the accused had made timely and seasonable demand for their return. On page 395 of the opinion in the Weeks case the court reaffirms and quotes with approval the doctrine that "The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers, or other articles of personal property, which are material and properly offered in evidence," laid down by the New York Court of Appeals in People v. Adams, 176 N. Y. 351, and approved in Adams v. New York, 192 U. S. 585. After so quoting, the court in the Weeks case says:

"This doctrine thus laid down by the New York Court of Appeals and approved by this court, that a court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent testimony, has the sanction of so many state cases that it will be impracticable to cite or refer to them in detail. Many of them are collected in the note to *State v. Turner,* 136 Am. St. Rep. 129, 135, *et seq.* After citing numerous cases the editor says: 'The underlying principle of all these decisions obviously is, that the court, when engaged in the trial of a criminal action, will not take notice of the manner in which a witness has possessed himself of papers or other chattels, subjects of evidence, which are material and properly offered in evidence: People v. Adams, 176 N. Y. 351, 98 Am. St. Rep. 675, 68 N. E. 636, 63 L. R. A. 406. Such an investigation is not involved necessarily in the litigation in chief, and to pursue it would be to halt in the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of such litigation, and which is wholly independent thereof.' "

POINT TWO.

The court instructed the jury, in part, as follows [Tr. Vol. 1, pp. 181-2-3]:

"The defendant in this case is charged with having placed and caused to be placed in the United States Postoffice in the city of Los Angeles, state of California, to be sent and delivered by the postoffice establishment of the United States, certain letters, for the purpose of executing a scheme to defraud alleged to have been previously devised by him. This scheme is

fully set forth and described in the indictment, which has been read to you, and which you will have with you in the jury room, and which, therefore, need not be recited here.

"The indictment contains six counts.

"All charge the same scheme to defraud, but each alleges the deposit in the United States mail of a letter different from those set forth in the other counts.

"To constitute the offense charged in the first count, three things are necessary: First, that the defendant devised the scheme therein described; second, that said scheme was one to defraud; third, that said defendant, for the purpose of executing said scheme, placed, or caused to be placed, in the postoffice at Los Angeles, California, to be sent and delivered by said postoffice establishment, the letter in said count described.

"If you are satisfied from the evidence, beyond a reasonable doubt, of the existence of the three constituents which I have enumerated, you will find the defendant guilty as charged in said first count. If, however, the evidence fails to so satisfy you of said constituents, or either of them, you will find the defendant not guilty as charged in the first count. * * *

"The section of the Criminal Code under which this prosecution was brought denounces as a crime the mailing or causing to be mailed of a letter in the execution of a scheme to defraud.

"The evil sought to be remedied is always important in determining the meaning of a statute. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small invest-

ments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.

"In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. Thus, it will also be seen, that one of the significant facts is the intent and purpose to defraud, without which there can be no conviction.

"The court further instructs you, that, if the representations intended to be made as alleged in the indictment were false, but defendant honestly believed them true, then said representations would not be fraudulent."

Portions of these instructions are quoted from Durland v. United States, 161 U. S. 313, cited by counsel.

The instruction complained of advised the jury that the offense consisted in the mailing of a letter with "the fraudulent intent," without which there would be no crime, and that this intent must be then present in the mind of the accused. "The fraudulent intent," the jury were fully advised by the instructions of the court, must be found to be an intent to further the scheme described in the indictment.

Argument is made that the verdict, convicting on the first count and acquitting on the remaining five counts, demonstrates that the instruction misled the jury to find the defendant guilty on the first count,

because the jury believed that the defendant had "the fraudulent intent" on August 28, 1911, when the letter counted on in the first count was mailed, but did not have such intent on August 25, 1911, nor prior thereto, when the other indictment letters were mailed.

This is more ingenious than convincing, and shows to what extremities we may be driven to account for the verdicts of juries. (There is a case where the jury found the defendant guilty on the first count in an indictment charging him with taking one package from a mail pouch and acquitted him on several other counts for taking other packages from the pouch at the same time. Counsels' argument could be carried out to cover that case.)

No claim is made that the evidence was insufficient to warrant a verdict of guilty on all the counts, nor is any fact or circumstance pointed out as affording any basis for the supposed belief by the jury that the defendant had formed his fraudulent intent between August 25th and August 28th, 1911.

Defendant had a fair trial and was fortunate to be convicted upon but one count in the indictment.

No reason is suggested why substantial justice has not been done in this case.

Respectfully submitted,

ALBERT SCHOONOVER,

United States Attorney.